

Stuart J. West, SBN 202041
West & Associates, A PC
2815 Mitchell Drive
Suite 209
Walnut Creek, CA 94598
925.262.2220

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Regal Art & Gifts, Inc.,

Plaintiff,

vs.

Fusion Products, Ltd., Menard, Inc.

Does 1-20

Defendants

) Case No.:

) Complaint for Copyright Infringement, Trade
) Dress Infringement, Passing Off, Intentional
) Interference with Prospective Business
) Advantage, Negligent Interference with
) Prospective Business Advantage, and Unfair
) Competition

Plaintiff, Regal Art & Gifts, Inc., (hereinafter, "Plaintiff") by and through their undersigned counsel, for their Complaint against Defendants Fusion Products, Ltd. (hereinafter, "Fusion") and Menard, Inc. (hereinafter "Menard") states the following. Allegations made on belief are premised on the belief that the same are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

COMPLAINT

1. Plaintiff Regal Art & Gifts, Inc. is a company incorporated in the state of California with a principal place of business at 1470 Civic Court, Suite 150, Concord, CA 94520, hereinafter referred to as "Plaintiff."
2. Upon information and belief, Defendant Fusion Products, Ltd. is a company headquartered at 2905 Argentia Road, Unit 2 &3, Mississauga, Ontario, Canada L5N 8G6 hereinafter referred to as "Fusion."

Complaint for Copyright Infringement, Unfair Competition and Trade Dress Infringement

3. Upon information and belief Defendant Menard, Inc. is a company incorporated in the State of Wisconsin with a principal place a business at 5101 Menard Drive, Eau Claire, WI 54703-5911 hereinafter referred to as “Menard”.
4. Menard and Fusion shall be known collectively as “Defendants.”
5. Upon information and belief, Fusion sold and/or distributed product covered by Plaintiff’s copyright into the Northern District of California.
6. Upon information and belief, Menard sold and/or distributed product covered by Plaintiff’s copyright into the Northern District of California.
7. This action arises under the Federal Copyright Act of 1976, as amended, 17 U.S.C. §101, et seq., hereinafter referred to as the “Act.” Jurisdiction is founded on Sections 1331 and 1338(a) of the Judicial Code (28 U.S.C. §§ 1331, 1338(a), 1338(b) and 1367).
8. Venue is conferred by § 1391(b)(2) and 1400(b) of the Judicial Code (28 U.S.C. § 1391(b)(2) and 1400(b)).

OPERATIVE FACTS

9. On or between August and September of 2012, Jiang Jianhua for Quanzhou Carry Far Art & Gift Co., Limited and Plaintiff entered into a contract where Plaintiff commissioned Jiang Jianhua for Quanzhou Carry Far Art & Gift Co., Limited to design and create a product referred to in Copyright Registration Number VA 1-836-905 as Mushroom Group, registration certificate attached as Exhibit A.
10. On August 9, 2012 Jiang Jianhua for Quanzhou Carry Far Art & Gift Co., Limited assigned all rights to Mushroom Group to Plaintiff, a copy of this assignment is attached as Exhibit B.
11. Plaintiff filed a Copyright application for Mushroom Group, without proper legal consultation, that registered on 9/24/12, but made a clerical error listing Regal Art & Gifts, Inc. as the author of Mushroom Group.

1 12. On or around April 7, 2014, Plaintiff filed a supplemental Copyright Registration to
2 amend the error listing Regal Art & Gifts, Inc. as the author.

3 13. The supplemental Copyright Registration was assigned Registration Number VA 1-433-
4 702 and is attached as Exhibit C.

5 14. On or about August 2012, Plaintiff was assigned rights from Jiang Jianhua for Quanzhou
6 Carry Far Art & Gift Co., Limited who created and put into tangible form a figure
7 hereinafter described as “Solar Mushroom Stake Dragonfly.”

8 15. The Solar Mushroom Stake Dragonfly was included in the Copyright application
9 registered on 9/24/12 and is copyrightable subject under the laws of the United States. A
10 copy of the images as filed with the Copyright application is attached as Exhibit D

11 16. Fusion manufactures and/or sells an item hereinafter described as “Dragonfly Mushroom
12 Garden Light” which is given model number 16420 and sold under the Patriot Lighting
13 name at Menard’s stores and is nearly identical to Plaintiff’s product described as Solar
14 Mushroom Stake Dragonfly. An image capture of Fusion’s product is attached as Exhibit
15 E.

16 17. Plaintiff designed their products to be distinctive.

17 18. Plaintiff alleges extreme similarity between Plaintiff’s products and Fusion’s products, as
18 evidenced by the referenced photos attached as Exhibits D and E.

19 19. Plaintiff’s catalog includes images of Plaintiff’s works.

20 20. Plaintiff’s catalog is publicly available.

21 21. Plaintiff and Fusion had a previous dispute over designs in Canada.

22 22. Upon information and belief, as a result of the dispute over designs in Canada, Fusion
23 stopped selling their product in Canada.

24 23. Upon information and belief, Fusion stopped selling in Canada because the product was
25 similar to Plaintiff’s products.

26 24. The products that are subject of this complaint are substantially similar to the products
27 Fusion stopped selling in Canada previously.

28 25. Fusion has access to Plaintiff’s catalogs.

1 26. Fusion is aware of Plaintiff's products.

2 27. Fusion unlawfully copied Plaintiff's design.

3 28. Fusion willfully copied Plaintiff's design.

4 29. Fusion's products in this complaint infringe Plaintiff's copyright.

5 30. Fusion's products are substantially similar to Plaintiff's products, exuding the same
6 overall appearance as Plaintiff's designs.

7 31. Fusion's products are strikingly similar to Plaintiff's products, exuding the same overall
8 appearance as Plaintiff's designs.

9 32. Fusion intentionally copied Plaintiff's designs.

10 33. Plaintiff suffered damages from sales as a result of Fusion's production and sale of
11 Fusion's products.

12 34. Plaintiff has adopted a particular dress, design and combination of features to produce a
13 particular visual appearance for the purpose of presenting its goods to the public.

14 35. Fusion has attempted to imitate Plaintiff's particular dress, design and combination of
15 features, in such a way as to mislead the public.

16 36. Fusion's products' appearance has caused a likelihood of confusion among the public as
17 to the original source of Plaintiff's products.

18 37. The multiplicity of similarities between Plaintiff's products and Fusion's products
19 evidence a conscious intent by Fusion to imitate and copy Plaintiff.

20 38. Fusion's actions are intended and/or operate to confuse the public.

21 39. Fusion misrepresented to prospective consumers that the design of Plaintiff's products
22 was their own.

23 40. Fusion is in a similar trade as Plaintiff.

24 41. Plaintiff's designs are of significant commercial value.

25 42. Fusion knew that Plaintiff's designs were of significant commercial value and intended to
26 disrupt that financial relationship.

1 43. Fusion's actions were to take advantage of Plaintiff's significant financial gain by the
2 manufacturing and distribution of Plaintiff's designs.

3 44. Fusion knew Plaintiff's sales were in the same region as Fusion's.

4 45. Plaintiff lost prospective sales due to Fusion's infringement.

5 46. Plaintiff was harmed by the lost sales.

6 47. Plaintiff's sale and distribution of its works and derivative works were damaged by
7 Fusion's copyright infringements.

8 48. Plaintiff has lost substantial revenue from Fusion's unlawful and willful copying of
9 Plaintiff's designs.

10 49. Plaintiff and Fusion have had previous discussions regarding Fusion unlawfully opying
11 Plaintiff's designs.

12
13 **COUNT ONE - COPYRIGHT INFRINGEMENT**
14

15 50. Paragraphs 1 through 49 are incorporated herein as though set forth in their entirety.

16 51. Plaintiff is the owner by assignment to all right, title and interest in Plaintiff's designs.

17 52. Defendants unlawfully copied Plaintiff's design.

18 53. Defendants willfully copied Plaintiff's design.

19 54. Defendants' products in this complaint infringe Plaintiff's copyright.

20 55. Defendants' products are substantially similar to Plaintiff's products, exuding the same
21 overall appearance as Plaintiff's copyrighted material.

22 56. Defendants' products are strikingly similar to Plaintiff's products, exuding the same
23 overall appearance as Plaintiff's copyrighted material.
24

25 **COUNT TWO – PASSING OFF**

26 57. Paragraphs 1 through 56 are incorporated herein as though set forth in their entirety.
27
28

1 58. Defendants misrepresented to prospective consumers that the copyrighted design of
2 Plaintiff's products were their own.

3 59. Defendants are in a similar trade as Plaintiff.

4 60. Defendants made this misrepresentation to injure the business or goodwill of Plaintiff.

5 61. As a result of Defendants' misrepresentation to prospective consumers, Plaintiff suffered
6 damages.

7
8 **COUNT THREE - TRADE DRESS**
9

10 62. Paragraphs 1 through 61 are incorporated herein as though set forth in their entirety.

11 63. The design of Plaintiff's products are distinctive designs owned by Regal Art & Gifts,
12 Inc.

13 64. When designing and manufacturing Plaintiff's products, Plaintiff adopted a particular
14 dress, design and combination of features to produce a particular visual appearance for
15 the purpose of presenting its goods to the public.

16 65. Defendants' have attempted to imitate Plaintiff's particular dress, design and combination
17 of features, in such a way as to mislead the public.

18 66. Defendants' product's appearance have caused a likelihood of confusion among the
19 public as to the original source of Plaintiff's products.

20 67. The multiplicity of similarities between Plaintiff's products and Defendants products
21 evidence a conscious intent by Defendants to imitate and copy Plaintiff.

22 68. Defendants' actions are intended and/or operate to confuse the public.

23 69. Plaintiff's sale of its own works is prejudiced by Defendants' imitation and copying of
24 Plaintiff's products, all to Plaintiff's irreparable damage.

25 **COUNT FOUR - INTENTIONAL INTERFERENCE WITH PROSPECTIVE**
26 **BUSINESS ADVANTAGE**
27
28

1 70. Paragraphs 1 through 69 are incorporated herein as though set forth in their entirety.

2 71. Plaintiff's designs are of a significant commercial value.

3 72. Defendants knew that Plaintiff's designs were of significant commercial value and
4 intended to disrupt that financial relationship.

5 73. Defendants' actions were to take advantage of Plaintiff's significant financial gain by the
6 manufacturing and distribution of Plaintiff's designs.

7 74. Defendants engaged in an independently wrong act by manufacturing and distribution of
8 Plaintiff's designs.

9
10 **COUNT FIVE - NEGLIGENT INTERFERENCE WITH PROSPECTIVE**

11 **BUSINESS ADVANTAGE**

12 75. Paragraphs 1 through 74 are incorporated herein as though set forth in their entirety.

13 76. Fusion owed Plaintiff a duty of care to not manufacture and sell products that infringed
14 on Plaintiff's designs.

15 77. Fusion knew Plaintiff's sales were in the same region as Fusions.

16 78. Fusion's breach of duty directly and proximately caused harm to Plaintiff, at least, by
17 causing Plaintiff to lose prospective sales.

18 79. Plaintiff was harmed by the lost sales.
19
20
21
22

23 **COUNT SIX – UNFAIR COMPETITION**
24

25 80. Paragraphs 1 through 79 are incorporated herein as though set forth in their entirety.

26 81. Fusion is unlawfully copying Plaintiff's products, which has contributed to the dilution of
27 the distinctive quality of Plaintiff's works in the marketplace.
28

1 82. Fusion is willfully copying Plaintiff's products, which has contributed to the dilution of
2 the distinctive quality of Plaintiff's works in the marketplace.

3 83. Plaintiff's sale and distribution of its works and derivative works are prejudiced by
4 Fusion's copyright infringements.

5 84. Plaintiff has lost substantial revenue from Fusion's unlawful and willful copying of
6 Plaintiff's designs.

7 85. Fusion, by their unauthorized appropriation and use of Plaintiff's copyrighted works,
8 have and are engaging in acts of unfair competition on Plaintiff's goodwill and the
9 public's acceptance of Plaintiff's designs, all to Plaintiff's irreparable damage.

10 86. Fusion, by their unauthorized appropriation and use of Plaintiff's copyrighted works,
11 have and are engaging in acts of unlawful appropriation on Plaintiff's goodwill and the
12 public's acceptance of Plaintiff's designs, all to Plaintiff's irreparable damage.

13 87. Fusion, by their unauthorized appropriation and use of Plaintiff's copyrighted works,
14 have and are engaging in acts of unjust enrichment on Plaintiff's goodwill and the
15 public's acceptance of Plaintiff's designs, all to Plaintiff's irreparable damage.

16 88. Fusion, by their unauthorized appropriation and use of Plaintiff's copyrighted works,
17 have and are engaging in acts of wrongful deception of the purchasing public, on
18 Plaintiff's good will and the public's acceptance of Plaintiff's designs, all to Plaintiff's
19 irreparable damage.

20 89. Fusion, by their unauthorized appropriation and use of Plaintiff's copyrighted works,
21 have and are engaging in acts of unlawful trading on Plaintiff's good will and the public's
22 acceptance of Plaintiff's designs, all to Plaintiff's irreparable damage.

23
24 **WHEREFORE, Plaintiff prays:**

25 A. Defendants be enjoined during the pendency of this action and permanently thereafter
26 from copying and using Plaintiff's copyrighted works;

27 B. Defendants be enjoined during the pendency of this action and permanently thereafter
28 from producing, selling, and distributing its infringing products to the public;

1 C. Defendants be ordered to pay to Plaintiff all damages suffered by Plaintiff due to their
2 unlawful acts, with prejudgment interest, as well as account for and pay to Plaintiff all gains and
3 profits that they have enjoyed at Plaintiff's expense and that such damages include Plaintiff's
4 costs and attorney's fees. At present, Plaintiff cannot ascertain the full extent of their damages
5 and lost profits;

6 D. Defendants be ordered to pay damages under Title 17 of the United States Code §
7 504(c) provides that in a case of willful infringement, a court may award up to the sum of
8 \$150,000 in damages for each infringement, as well as full court costs and reasonable attorney's
9 fees.

10 E. Such other relief as the equities of the case may require and as this Court may deem
11 just and proper under the circumstances; and

12 F. A trial by jury.

13
14
15 Dated this 23rd day of September, 2015

16
17
18 /Stuart J. West/
19 Stuart J. West
20 CA SBN 202041
21 West & Associates, A PC
22 2815 Mitchell Drive
23 Suite 209
24 Walnut Creek, CA 94598
25 925.262.2220
26
27
28

Exhibit A

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Register of Copyrights, United States of America

Registration Number
VA 1-836-905

Effective date of
registration:
September 24, 2012

Title

Title of Work: Mushrooms Group

Completion/Publication

Year of Completion: 2012

Date of 1st Publication: August 28, 2012

Nation of 1st Publication: United States

Author

Author: Regal Art & Gifts, Inc.

Author Created: sculpture

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Copyright claimant

Copyright Claimant: Regal Art & Gifts, Inc.

4589 Pacheco Blvd., Martinez, CA, 94553, United States

Rights and Permissions

Organization Name: Regal Art & Gifts, Inc.

Name: Audrey Costello

Email: audrey@regalgift.com

Telephone: 925-335-2300

Address: 4589 Pacheco Blvd

Martinez, CA 94553 United States

Certification

Name: Audrey Costello

Date: September 24, 2012

Applicant's Tracking Number: 10341,10342,10343,10344

Exhibit B



INTELLECTUAL PROPERTY ASSIGNMENT AGREEMENT

This agreement is entered into between Regal Art & Gift, Inc. (Herein referred to as "Regal"), located at 4589 Pacheco Boulevard, Martinez CA 94553 USA and Jiang Jiansuo / Quanzhou Carry Far Art & Gift Co., Limited (hereinafter referred to as "Vendor"), located at Hao Yang Building, Zhao Lian Industrial zone, Feng Ze area, Quan Zhou, Fujian, China, hereinafter collectively referred to as the "Parties."

Regal develops proprietary products that they contract to manufacture, import, market and sell wholesale in the gift & garden industry. At Regal's request and direction, Vendor created designs for Regal for the products specified in the attached Appendix A (hereinafter referred to as the "Assigned Product Designs").

In consideration of the premises and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Vendor hereby assigns and transfers to Regal, its successors and assigns, Vendor's entire right, title, and interest in and to the Assigned Product Designs and all works based upon, derived from, or incorporating the Assigned Product Designs, including: (i) any copyright, trade dress, trademark, patent, design patent, trade secret, confidential information, know-how, process, technology, idea, concept, design right, or invention; (ii) any registrations and applications relating to any of the foregoing and any renewal and extensions thereof; (iii) any other proprietary or other intellectual property right in and to the Assigned Product Designs, whether arising under the laws of the United States or any other country; and (iv) all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and in and to all causes of action, either in law or in equity for past, present, or future infringement of the intellectual property rights in and to the Assigned Product Designs, and in and to all rights corresponding to the foregoing throughout the world.
2. In the event that Regal desires to file applications to register and/or protect the intellectual property rights of the Assigned Product Designs, including copyright, patent, design patent, trademark, trade dress, or any other intellectual property right, Vendor hereby agrees to cooperate with the filing of any such application, including signing and/or executing any forms, declarations or other documents associated with the applications. If Vendor does not respond to a request by Regal to cooperate with an application in the agreed-upon manner within ten (10) days after such a request is made, Vendor hereby agrees to grant Regal a limited power

Page 1 of 3

of attorney for the purpose of executing documents associated with the application on Vendor's behalf.

3. Each Party hereby represents and warrants to and covenants to the other Party that such Party: (a) has read and understands this Agreement, and has entered into it voluntarily and without coercion; (b) has been advised, and has had the opportunity, to consult with legal counsel of its choosing with respect to this Agreement and the matters contemplated hereby; (c) is entering into this Agreement based upon its own investigation and is not relying on any representations or warranties of the other Party or any other person not set forth herein; (d) has not assigned or otherwise transferred any rights or obligations required by this Agreement; (e) has the legal authority to enter into this Agreement and perform its obligations hereunder; and (f) has duly executed this Agreement, and such Agreement constitutes the valid and binding obligation of such Party, enforceable against it in accordance with its terms, except as such enforceability may be limited by bankruptcy or similar laws affecting creditors rights generally and general principles of equity.

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective legal representatives, successors, and assigns.

IN WITNESS WHEREOF, the parties have executed this agreement effective as of the date first written above

Regal Art & Gift, Inc.

Signed:



Print Name: Bill Costello

Title: President

Date: August 8, 2012

Vendor Name: Jiang Jianhua / Quanzhou Carry Far Art & Gift Co. Limited

Signed:



Print Name: 蒋建华 Jiang Jianhua

Title: President

Date: August 8, 2012

APPENDIX A:

1. Regal Item # 10341 (Vendor Item # CF10) Solar Mushroom Stake - Butterfly
2. Regal Item # 10342 (Vendor Item # CF11) Solar Mushroom Stake - Dragonfly
3. Regal Item # 10343 (Vendor Item # CF13) Solar Mushroom Stake - Frog
4. Regal Item # 10344 (Vendor Item # CF12) Solar Mushroom Stake - Ladybug

PHOTOS:



Exhibit C

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Form CA
For Supplementary Registration
UNITED STATES COPYRIGHT OFFICE

VA 1-433-702

TX TXU PA PAU MA MAU SR SRU RE

MAURICE A. PALLANTE
Register of Copyrights, United States of America

April 7 2014

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

Title of Work ▼
Mushroom Group

Registration Number of the Basic Registration ▼
VA 1-836-005

Year of Basic Registration ▼
2012

Number of Author(s) ▼
Regal Art & Gifts, Inc.

Number of Copyright Claimant(s) ▼
Regal Art & Gifts, Inc.

Location and Nature of Incorrect Information in Basic Registration ▼
Line Number 4 and 5

Line Heading or Description Author: Transfer

Incorrect Information as it Appears in Basic Registration ▼
Regal Art & Gifts, Inc.

Corrected Information ▼
Work was not "made for hire," Author domiciled in China;
Jiang Jianhua, Transfer by assignment

Explanation of Correction ▼
Regal Art & Gifts, Inc. named as author, should have been Jiang Jianhua - Claimant mistakenly listed as author.
Author transferred copyright to claimant by assignment

Location and Nature of Information in Basic Registration to be Amplified ▼

Line Number Line Heading or Description

Amplified Information and Explanation of Information ▼

MORE ON BACK ▶ • Complete all applicable sections (D-C) on the reverse side of this page.
• See required instructions. • Sign the form in black ink.

DO NOT WRITE HERE

Page 1 of 2

*Added by C.O. from phone call to
Stuart West on 5/19/2014.

FORM CA RECEIVED	FORM CA
APR 07 2014	
FUNDS RECEIVED DATE	
APR 7 2014	
EXAMINED BY	FOR COPYRIGHT OFFICE USE ONLY
CORRESPONDENCE <input checked="" type="checkbox"/>	
REFERENCE TO THIS REGISTRATION ADDED TO BASIC REGISTRATION <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

Continuation of: ☐ Part B or ☐ Part C

Correspondence: Give name and address to which correspondence about this application should be sent.

Stuart West
2185 Mitchell Drive, Suite 209
Walnut Creek, CA 94598

Phone (925) 262 2220 Fax (925) 262 2205 Email copyright@westpatentlaw.com

Deposit Account: If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.
Name _____
Account Number _____

Certification: I, the undersigned, hereby certify that I am the: (Check only one)

☐ author ☐ owner of exclusive right(s)
☐ other copyright claimant ☒ duly authorized agent of

Royal Art & Gifts, Inc.

Name of author or other copyright claimant, or owner of exclusive right(s) ☒
of the work identified in this application and that the statement made by me in this application are correct to the best of my knowledge.

Typed or printed name ☒ Stuart J. West Date ☒ 2/5/2014

Handwritten signature (X) ☒

Certificate
will be
mailed in
window
envelope
to this
address:

Name ☒ Stuart West
Mailing address ☒
2185 Mitchell Drive, Suite 209
City/State/Zip ☒
Walnut Creek, CA 94598

COPIES
1. Government of necessary records
2. Register your application in Section 7
3. FURNISH COPIES TO THE STATES REQUIRED
4. Application fee
5. Payment of fee (see fee schedule on
form) or payment payable to Registrar of
Copyright
U.S. GOVT.
Library of Congress
Copyright Office
101 Independence Avenue SE
Washington, DC 20540-4001

*IT (GCC) (GCR) Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 408, or in any other statement filed in connection with the application, shall be fined not more than \$5,000.

Form CA-Pull Rev. 3/5/2006 Price \$12.000-000 Printed on recycled paper

U.S. Government Printing Office: 2006-0-000-000

Exhibit D – Regal’s Solar Mushroom Stake Dragonfly



Exhibit E – Fusion Product’s Dragonfly Mushroom Garden Light

